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ALEXANDER L. STEVAS
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No. 83-2166 (3)

IN THE

Supreme Court of the United States

October Term, 1984

PHILIP Q. ZAUDERER,
Appellant,

v.

OFFICE OF DISCIPLINARY COUNSEL
OF THE SUPREME COURT OF OHIO,
Appellee.

On Appeal from the Supreme Court of Ohio

JOINT APPENDIX

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APPEAL DOCKETED July 2, 1984
PROBABLE JURISDICTION NOTED October 1, 1984

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OPINION OF THE SUPREME COURT OF OHIO (omitted, set forth in Appendix to Jurisdictional Statement at 1a)

FINDINGS OF FACT AND RECOMMENDATION OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE (omitted, set forth in Appendix to Jurisdictional Statement at 8a)

ORDER OF THE OHIO SUPREME COURT IMPOSING PUBLIC REPRIMAND ON APPELLANT (omitted, set forth in Appendix to Jurisdictional Statement at 22a)

RELEVANT DOCKET ENTRIES (BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO)*

July 29, 1982	Complaint and Certificate filed.
September 13, 1982	Stipulation of Fact between Relator and Respondent filed.
September 13, 1982	Motion to Dismiss and Brief of Respondent filed, along with accompanying affidavits of Robert L. Hallet, Beverly J. Carr, Kay M. Carver, and Respondent.
October 25, 1982	Memorandum of Relator in Opposition to Motion to Dismiss filed.
November 3, 1982	Order denying Motion to Dismiss entered.
November 12, 1982	Motion by Respondent to Reconsider filed.
November 22, 1982	Memorandum of Relator in Opposition to Motion to Reconsider filed.
November 23, 1982	Amendment to Stipulation of Fact filed.
November 24, 1982	Order denying Reconsideration entered.
December 17, 1982	Amended Complaint filed.
January 14, 1983	Answer of Respondent filed.
May 24, 1983	Second Stipulation of Fact between Relator and Respondent filed.
May 24, 1983	Trial Brief of Respondent filed.
May 24, 1983	Hearing held before a Panel of Board of Commissioners and Grievances of the Supreme Court of Ohio.

* The Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio does not maintain a formal docket. The Board's "docket" entries are taken from the documents filed with the Secretary and Chairman of the Board in Case No. 454, *In Re. Complaint Against Philip Q. Zauderer*, before the Board decision was certified to the Supreme Court of Ohio.

June 13, 1983	Post-trial Brief of Relator filed.
June 13, 1983	Post-trial Brief of Respondent filed.
June 16, 1983	Reply Brief of Respondent filed.
June 24, 1983	Decision of Panel and Board of Commissioners Entered.
July 20, 1983	Order to Show Cause regarding briefing schedule entered.
August 19, 1983	Extension of time to file brief of Respondent until August 24, 1983, entered.
August 19, 1983	Brief of Dispatch Printing Company as *amicus curiae* filed.
August 24, 1983	Objections of Respondent filed.
August 24, 1983	Brief of Respondent filed.
August 24, 1983	Brief of American Civil Liberties Union Foundation of Ohio, Inc. as *amicus curiae* filed.
August 24, 1983	Brief of Ohio Newspaper Association as *amicus curiae* filed.
September 23, 1983	Brief of Relator filed.
October 12, 1983	Reply Brief of Respondent filed.
December 1, 1983	Statement of Reliance on Additional Authorities filed by Respondent.
December 6, 1983	Oral Argument held.
April 4, 1984	Decision of Ohio Supreme Court entered.
April 4, 1984	Order imposing public reprimand and costs against Respondent entered.
April 27, 1984	Motion for Stay of Order to Pay Costs and Memorandum in Support of Motion filed.
May 23, 1984	Notice of Appeal by Respondent filed.

BEFORE THE BOARD OF COMMISSIONS ON GRIEVANCES AND DISCIPLINE OF THE SURPEME COURT OF OHIO

In re:
Complaint against
Philip Q. Zauderer
52 West Whittier
Columbus, Ohio 43206
RESPONDENT

Office of Disciplinary Counsel
360 South Third Street, Suite #109
Columbus, Ohio 43215
RELATOR

No. 454

COMPLAINT AND CERTIFICATE (Rule V of the Supreme Court Rules for the Government of The Bar Ohio.)

Now comes the Relator and alleges that Philip Q. Zauderer, an Attorney at Law, duly admitted to the practice of law in this State of Ohio is guilty of the following misconduct:

COUNT I

1. Relator, Office of Disciplinary Counsel, is authorized to file this complaint pursuant to Gov. Rule V.
2. Philip Q. Zauderer, Respondent, was admitted to the practice of law in the State of Ohio on October 17, 1964, and is subject to the Rules for the Government of the Bar of Ohio.

COUNT II

3. On November 25 and 26, 1981, Respondent caused to be published in the Columbus Citizen Journal an advertisement offering legal services by him, wherein he offered "a full legal refund if convicted" of "drunk driving." (Exhibit "A").
4. Relator alleges that this legal service advertisement constitutes an offer of a "contingent fee" for services rendered in a criminal matter, which offer violates Disciplinary Rule 2-101(B)(15).

COUNT III

5. Relator incorporates herein all allegations contained in prior paragraphs and alleges as follows:

6. Relator says that contingency fees in criminal cases are specifically prohibited by Disciplinary Rule 2-106(C) of the Ohio Code of Professional Responsibility.
7. Relator alleges that advertising himself as being available to perform a legal service under conditions which are not permitted under the Code of Professional Responsibility constitutes a violation of Disciplinary Rule 2-101(A) in that such representation is false, fraudulent, misleading, and deceptive to the public.

COUNT IV

8. Relator incorporates herein all allegations contained in prior paragraphs and alleges as follows:
9. Disciplinary Rule 2-101(B) sets forth the list of information which can be published in a legal service advertisement.
10. On or about March 11, 1982, Respondent caused to be published in the Columbus Citizen-Journal an advertisement which contained substantial information which is not permitted by Disciplinary Rule 2-101(B), including reference to a specific, potential legal problem, which language is not necessary to advise the public of information which is needed to enable a consumer to properly identify or evaluate, a legal need. (Exhibit "B").
11. During March, April and May 1982, Respondent caused the same legal service advertisement or an advertisement essentially identical in nature, to be run in several daily newspapers throughout the State of Ohio.
12. Relator alleges that the content of said ad constitutes a violation of Disciplinary Rule 2-101(A)(B).

COUNT V

13. Relator incorporates herein all allegations contained in prior paragraphs and alleges as follows:
14. Disciplinary Rule 2-101(B) prohibits the use of "drawings, illustrations, animations, portrayals, dramatizations, slogans, music, lyrics, or other use of pictures, except the use of pictures of the advertising lawyer, or the use of a portrayal of the scale of justice" in a legal service advertisement.
15. The advertisement referenced in the preceding Count IV includes a drawing or other illustration of an "I.U.D.".

16. Relator alleges that the publication of said drawing or illustration in a legal service advertisement constitutes a violation of Disciplinary Rule 2-101(B).

COUNT VI

17. Relator incorporates herein all allegations contained in prior paragraphs and alleges as follows:
18. Disciplinary Rule 2-101(B) provides that legal service adertisements must be "presented in a dignified manner."
19. Relator alleges that the inclusion of a drawing or illustration or other representation of an I.U.D. in a legal service advertisement and the inclusion of comments which are directed at exciting action rather than informing the public does not constitute a "dignified manner" for informing a consumer of the availability of a practitioner to perform certain legal services, and that such material is detrimental to the public and serves no legitimate purpose which should or need be approved for legal service advertising and that such conduct constitutes a violation of Disciplinary Rules 2-101(A)(B) and 1-102(A)(6).

COUNT VII

20. Relator incorporates herein all allegations contained in prior paragraphs and alleges as follows:
21. Relator asserts that prior to November, 1981, Respondent caused a certain advertisement to be published in newspapers, as a result of which Relator had discussions with Respondent pertaining to the existence of relevant rules of the Code of Professional Responsibility as adopted by the Supreme Court of Ohio and as then were in effect and which pertained to the legal service advertisement which Respondent was then running.
22. Relator states that as a result of its correspondence and meetings with Respondent in regard to the prior advertisement, Respondent was completely informed of all prohibitions contained in Disciplinary Rule 2-101 and other relevant sections of the Code of Professional Responsibility.
23. Relator alleges that Respondent thereafter had full knowledge of the relevant sections of the Code of Profes-

sional Responsibility and that the placement of the two advertisements now in question was done with the intent to violate Disciplinary Rule 2-101, all of which constitutes a violation of Gov. Rule V and the oath of Office.

/s/ Charles W. Kettlewell
Assistant Disciplinary
Counsel
360 South Third Street, Suite
#109
Columbus, Ohio 43215
Counsel for Relator

CERTIFICATE

The undersigned Leonard J. Stern of the Office of Disciplinary Counsel Association hereby certifies that Charles W. Kettlewell, Assistant Disciplinary Counsel, is duly authorized to represent Relator in the premises and does accept the responsibility of prosecuting the complaint to its conclusion. After investigation, Relator believes reasonable cause exists to warrant a hearing on such complaint.

Dated July 28, 1982
/s/ Leonard J. Stern
Leonard J. Stern
Disciplinary Counsel

(Rule V of the Supreme Court Rules for the Government of the Bar of Ohio.)

Section (8)

THE COMPLAINT, BY WHOM SIGNED. A complaint, as the term is used herein, shall mean a formal written complaint alleging misconduct or mental illness of one who shall be designated therein as the Respondent. Such complaint shall not be accepted for filing unless it is signed by one or more members of the Bar of Ohio in good standing (who shall be counsel for the Relator and supported by a certificate in writing signed either by the Chairman of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association or by the President, Secretary or Chairman of the Grievance Committee of any regularly organized local bar association in the State (which association shall be deemed the Relator), certifying that said counsel are duly authorized to represent said Relator in the premises and have accepted the responsibility of prosecuting the complaint to conclusion. Such certification shall constitute a representation that, after investigation, the Relator believes reasonable cause exists to warrant a hearing on such complaint. The complaint may also, but need not, be signed by the person aggrieved.

DRUNK DRIVING

Full legal fee refunded if convicted of DRUNK DRIVING.

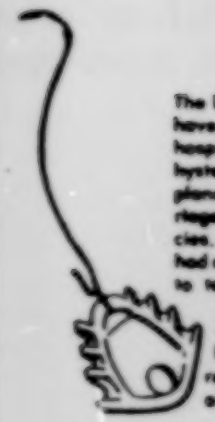
Expert witness (chemist) fees must be paid.

Call (614) 444-1113.

Phillip Q. Zauderer & Associates,
Attorneys at Law
52 West Whittier, Columbus, Ohio 43206

EXHIBIT "A"

DID YOU USE THIS IUD?



The Dalkon Shield Interuterine Device is alleged to have caused serious pelvic infections resulting in hospitalizations, tubal damage, infertility, and hysterectomies. It is also alleged to have caused unplanned pregnancies ending in abortions, miscarriages, septic abortions, tubal or ectopic pregnancies, and full-term deliveries. If you or a friend have had a similar experience do not assume it is too late to take legal action against the Shield's manufacturer. Our law firm is presently representing women on such cases. The cases are handled on a contigent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients.

For free information call 1-614-444-1113

The Law Firm of

Philip Q. Zauderer & Associates

52 West Whittier Street
Columbus, Ohio 43206

EXHIBIT "B"

BEST AVAILABLE COPY

BEFORE THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

In Re:	:
Complaint Against	:
Philip Q. Zauderer	:
	:
Respondent	:Case No. 454
Office of Disciplinary Counsel	:
Relator.	:

STIPULATION OF FACT BETWEEN RELATOR AND RESPONDENT

The Relator and Respondent and their counsel, for the puposes of this proceeding and without the necessity for evidence, hereby stipulate and agree that the following facts are true and can and should be treated as such by the Board:

[Relating To Count I Of Relator's Complaint]

1. Gov. Rule V authorizes the Relator, Office of Disciplinary Counsel, to file the Complaint which was filed against the Respondent on July 29, 1982.

2. The Respondent, Philip Q. Zauderer of Columbus, Ohio, was admitted to the practice of law in Ohio on October 17, 1964. Since that time, no disciplinary complaint, other than that filed by the Relator in this case, has ever been filed with the Board of Commissioners against him.

[Relating To Count II & III Of Relator's Complaint]

Drunk Driving Advertisement

3. The respondent caused the advertisement attached to the Relator's Complaint as Exhibit A to be published in *The Columbus Citizen-Journal*, a newspaper of general circulation, on November 25 and 26, 1981.

4. Upon receipt of a telephone call from the Relator regarding the said advertisement on or about November 26, 1981, the Repondent promptly withdrew it.

5. Respondent has asserted by affidavit, and Relator does not contest, that as a result of the advertisement, the Respondent

was approached by two potential clients but declined to represent them, and that the Respondent did not "enter into an arrangement for, charge, or collect a contingent fee for representing a client" in a drunk driving or other criminal case.

6. Prior to November, 1981, and during the period of May 26, 1981 through August 18, 1981, the Respondent and counsel for the Relator discussed DR 2-101 and the leading United States Supreme Court cases regarding legal service advertising.

7. Disciplinary Rule 2-106(C), promulgated by the Supreme Court of Ohio on October 5, 1970, and in effect on November 25 and 26, 1981, provides that:

> A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

8. Disciplinary Rule 2-101(A), promulgated by the Supreme Court of Ohio on November 28, 1977 and in effect on November 25 and 26, 1981, and since that time, provides that:

> A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

9. Disciplinary Rule 2-101(B)(15), promulgated by the Supreme Court of Ohio on November 28, 1977, and in effect on all relevant dates, provides that:

> DR 2-101(B) *** Only the following information may be published or broadcast:
>
> (1) ***
>
> ***
>
> (15) Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of court costs and expenses.
>
> (16) ***

[Relating to Counts IV Through VII Of Relator's Complaint] Dalkon Shield Advertisement

10. Disciplinary Rule 2-101(B), promulgated by the Supreme Court of Ohio on November 28, 1977, and commonly known as the Legal Service Advertising Rule, last amended on June 11, 1979, provides as follows:

> (B) In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, in print media or over radio or television. Print media includes only regularly published newspapers, magazines and other periodicals, classified telephone directories, city, county, and suburban directories, law directories and law lists. The information disclosed by the lawyer in such publication or broadcast shall comply with DR 2-101(A) and be presented in a dignified manner without the use of drawings, illustrations, animations, portrayals, dramatizations, slogans, music, lyrics or the use of pictures, except the use of pictures of the advertising lawyer, or the use of a portrayal of the scales of justice. Only the following information may be published or broadcast:
>
> (1) Name, including name of law firm and names of professional associates, addresses and telephone numbers;
>
> (2) One or more fields of law in which the lawyer or law firm is available to practice, but may not include a statement that the practice is limited to or concentrated in one or more fields of law or that the lawyer or law firm specializes in a particular field of law unless authorized by DR 2-105.
>
> (3) Age;
>
> (4) Date of admission to the bar of a state, or federal court or administrative board or agency;
>
> (5) Schools attended, with dates of graduation, degrees and other scholastic distinctions;
>
> (6) Public or quasi-public offices;
>
> (7) Military service;

(8) Published legal authorships;

(9) Holding scientific, technical and professional licenses, and memberships in such associations or societies;

(10) Foreign language ability;

(11) Whether credit cards or other credit arrangements are accepted;

(12) Office and telephone answering service hours;

(13) Fee for an initial consultation;

(14) Availability upon request of a written schedule of fees or an estimate of the fee to be charged for specific services;

(15) Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of court costs and expenses;

(16) Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;

(17) Fixed fees for specific legal services;

(18) Legal teaching positions, memberships, offices, committee assignments, and section memberships in bar associations;

(19) Memberships and offices in legal fraternities and legal societies;

(20) In law directories and law lists only, names and addresses of references, and, with their written consent, names of clients regularly represented.

11. By correspondence and other communications during the period of May 26, 1981 through August 18, 1981, the Respondent and Counsel for Relator discussed advertisements proposed to be run by the Respondent, including the Dalkon Shield advertisement of Minnesota attorneys Appert & Pyle (set forth below), upon which the Dalkon Shield advertisement in question in this case was based:

DID YOU USE THIS IUD?

The Dalkon Shield Intrauterine Device is alleged to have caused serious pelvic infections resulting in hospitalizations, tubal damage, infertility, and hysterectomies. It is also alleged to have caused unplanned pregnancies ending in abortions, miscarriages, septic abortions, tubal or ectopic pregnancies, and full-term deliveries. If you or a friend have had a similar experience do not assume it is too late to take legal action against the Shield's manufacturer. Our law firm is presently representing many women on such cases. The cases are handled on a contingent fee basis for one-third of the amount recovered. If there is no recovery, no legal fees are owed by our clients.

For more information call toll free 1-800-328-1070 In Minnesota call collect 612/338-2111 or write

The law firm of

APPERT & PYLE

Suite 970 First Bank Place West 332 Minnesota Street Minneapolis, Minnesota 55401

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12. Prior to October, 1981, counsel for the Relator advised the Respondent that the Appert & Pyle advertisement and a second advertisement proposed by the Respondent (which was never published) did not comply with Ohio's DR 2-101(B).
13. In a case where the charges were similar to but not identical to the charges in this case, and where the disciplinary rule in question was not identical to Ohio's DR 2-101, on December 18, 1981, the Supreme Court of Minnesota in *Matter of Discipline of Appert & Pyle*, 315 N.W. 2d 204 (1981) held, as noted in syllabus 1 of the decision, at page 205:

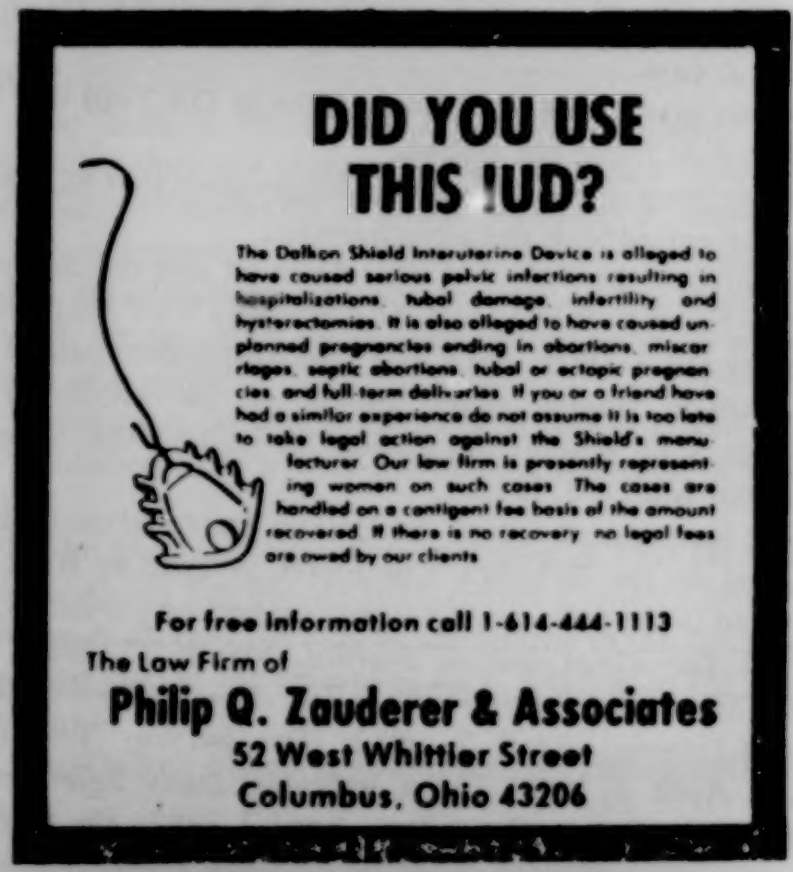
> 1. It is an unconstitutional restriction on an attorney's and the public's first amendment rights to prohibit attorneys from publishing or otherwise distributing written advertisements as long as the advertisements do not contain false, fraudulent, deceptive, or misleading information.

14. On January 25, 1982, the United States Supreme Court issued a landmark decision concerning lawyer advertising in a case captioned *Matter of R.M.J.*, 102 S.Ct. 929 (1982).
15. Because of its significance, the R.M.J. decision was printed in its entirety in the *Ohio State Bar Association Report*, Vol. 55, No. 8, February 22, 1982, at pages 309-318 inclusive.
16. The Court summarized "commercial speech doctrine" in the *R.M.J.* case at page 937, where it stated:

> Commercial speech doctrine, in the context of advertising for professional services, may be summarized generally as follows: Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proven that in fact such advertising is subject to abuse, the states may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the states may not place an absolute prohibition on certain types of potentially misleading

> information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive.

17. Prior to the *R.M.J.* decision being reported in the *Ohio State Bar Association Report*, Judge Stern of the Office of Disciplinary Counsel (Relator) mailed a copy of the said decision to various lawyers, including the Respondent.
18. After *R.M.J.* was published, the Respondent telephoned Judge Stern for an appointment to discuss *R.M.J.* and Ohio's Rule on lawyer advertising, DR 2-101.
19. On Friday, March 5, 1982, at 3:30 p.m., the Respondent and Judge Stern met in Judge Stern's office for approximately 45 minutes.
20. During the meeting of March 5, 1982, the Respondent showed Judge Stern a proposed newspaper advertisement (based on the Appert & Pyle advertisement), a copy of which proposed advertisement is set forth below and attached to the Relator's Complaint as Exhibit B:


DID YOU USE THIS IUD?
The Dalkon Shield Interuterine Device is alleged to have caused serious pelvic infections resulting in hospitalizations, tubal damage, infertility and hysterectomies. It is also alleged to have caused unplanned pregnancies ending in abortions, miscarriages, septic abortions, tubal or ectopic pregnancies and full-term deliveries. If you or a friend have had a similar experience do not assume it is too late to take legal action against the Shield's manufacturer. Our law firm is presently representing women on such cases. The cases are handled on a contigent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients.
For free information call 1-614-444-1113
The Law Firm of
Philip Q. Zauderer & Associates
52 West Whittier Street
Columbus, Ohio 43206

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21. The Respondent asked Judge Stern whether or not he thought the said Dalkon Shield advertisement was in compliance with the law as set forth by the United States Supreme Court in *R.M.J.*
22. Judge Stern advised the Respondent that the Office of Disciplinary Counsel does not have authority to issue advisory opinions nor to approve or disapprove legal service advertisements.
23. Judge Stern advised the respondent that it was Judge Stern's interpretation of *R.M.J.* that "misleading" information cannot be published in a legal advertisement.
24. The Ohio Rules governing lawyer advertising were discussed, and it was recognized by both the Respondent and Judge Stern that the Dalkon Shield advertisement did not conform to the Ohio rule, DR 2-101(B).
25. Judge Stern advised the Respondent that one could not tell how much viability remained in DR 2-101 subsequent to the *R.M.J.* case; and that the Supreme Court of Ohio had taken no position on DR 2-101(B) subsequent to the announcement of the *R.M.J.* case.
26. It was agreed that there were items in DR 2-101 that the Court in *R.M.J.* did not discuss.
27. Judge Stern did not advise the Respondent that he should or should not publish the advertisement.
28. Following the *Appert & Pyle* decision and the Supreme Court decision in *R.M.J.*, and the discussion with Judge Stern regarding DR 2-101(B) and *R.M.J.*, the Respondent caused the said Dalkon Shield advertisement to be published in newspapers of general circulation throughout the State of Ohio after March 8, 1982.
29. The Respondent caused the Dalkon Shield advertisement (attached to the Relator's Complaint as Exhibit B) to be published in the following Ohio newspapers on the date(s) indicated: *The Akron Beacon Journal,* March 23, 1982; *The Athens Messenger,* April 7, 1982; *The (Bowling Green) Daily Sentinel-Tribune,* April 7, 1982; *The Bucyrus Telegraph-Forum,* April 7, 1982; *The (Cambridge) Daily Jeffersonian,* April 7, *The Canton Repository,* April 7, 1982; *The (Celina)*

Daily Standard, April 8, 1982; *The Cincinnati Post,* March 2, 1982; *The Circleville Herald,* April 7, 1982; *The Coshocton Tribune,* April 19, 1982; *The (Defiance) Crescent-News,* April 7, 1982; *The Delaware Gazette,* April 7, 1982; *The Delphos Herald,* April 7, 1982; *The (East Liverpool) Evening Review,* April 8, 1982; *The Findlay Courier,* April 7, 1982; *The Hamilton Journal-News,* April 6, 1982; *The Kent-Ravenna Record-Courier,* April 2, 1982; *The Lancaster Eagle-Gazette,* April 8, 1982; *The Logan Daily News,* April 1 & 2, 1982; *The (London) Madison Press,* April 5, 1982; *The Mansfield News Journal,* March 22, 1982; *The Martins Ferry Times-Leader,* March 24, 1982; *The (Massillon) Evening Independent,* April 12, 1982; *The (New Philadelphia) Times Reporter,* April 5, 1982; *The (Napoleon) Northwest-Signal,* April 12, 1982; *The Niles Times,* March 31, 1982; *The Portsmouth Times,* April 7, 1982; *The Sandusky Register,* April 7, 1982; *The Troy Daily News,* May 22, 1982; *The Upper Sandusky Chief Union,* March 22, 1982; The (Washington Court House) Record-Herald, April 7, 1982; *The Wooster Daily Record,* April 7, 1982; *The Xenia Daily Gazette,* April 6, 1982; *The Zanesville Times Recorder,* April 5, 1982.
30. The Dalkon Shield advertisement published by the Respondent does not contain a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.
31. The newspapers were requested by the Respondent to publish the advertisement when grocery advertisements were heaviest, in an effort to provide information to as many women as possible.
32. Newspapers in which the Dalkon Shield advertisement was published have a total combined circulation of approximately _____.
33. In the *Matter of Discipline of Appert & Pyle* (Minnesota Supreme Court File No. 48803), retired District Court Judge Clarence A. Rolloff, serving as the referee in the disciplinary poceeding, found the following facts relating to the Dalkon Shield to be true:

A. The Dalkon Shield is an intrauterine contraceptive

devise (I.U.D.) manufactured by the A.H. Robins Co., hereinafter referred to as Robins. The device was designed in the 1960's by Dr. Hugh Davis of Johns Hopkins University and Mr. Irwin Lerner.

B. On June 12, 1970, Robins bought all patent rights to the Dalkon Shield for approximately $750,000.00 plus a ten percent royalty agreement plus employing Dr. Davis as a consultant.

C. Thereafter, Robins began national marketing of the Dalkon Shield. The Robins company estimates that nationally, approximately 2.2 million devices were inserted in women from 1970 through 1975.

D. At the time the Dalkon Shield was first marketed, it was recognized as a medica! device rather than a drug and did not therefore require Food & Drug Administration (FDA) approval prior to marketing.

E. After national marketing of the Dalkon Shield began, a variety of medical problems surfaced allegedly related to the use of the device.

F. Congressional hearings were conducted in 1973 and 1974 concerning whether the FDA ought to be empowered to regulate intrauterine devices, but it was not until early 1976 when new legislation conferred such authority on the FDA.

G. On June 28, 1974, sales of the Dalkon Shield in the United States were suspended by Robins.

H. A specific investigation of Robins began in August 1974, resulting in an FDA advisory committee recommendation that the Dalkon Shield be permitted to be remarketed if Robins made certain design changes. In approximately February of 1975, Robins decided to abandon efforts to remarket the Dalkon Shield.

I. Numerous individual civil actions involving the Dalkon Shield have been initiated against Robins.

J. The Plaintiffs in such cases have alleged numerous injuries as a result of the use of the product including total hysterectomies, septic abortions,

miscarriages, uterine infections causing infertility, severe cramping and bleeding, pain with intercourse, as well as accompanying loss of consortium, psychological and emotional injuries.

K. The actions have proceeded on a number of legal theories including negligence, breach of implied warranty, breach of express warranty, strict liability, misrepresentation under Section 402(b) of the Restatement of Torts, civil conspiracy, gross and wanton negligence, willful misrepresentation, fraud and local consumer protection statutes.

L. Robins aggressively advertised the Dalkon Shield both before and after learning of its defects, misrepresented its dangers and defects to doctors and others, and never undertook to inform the public generally or individuals about those dangers and defects.

M Neither the Robins Company, the FDA, the AMA, nor any other agency or organization had taken steps to inform all users of the Dalkon Shield of its dangers and defects.

N. Because of their nature, the Dalkon Shield civil cases are not amenable for the bringing of a class action.

34. In being admitted to the Ohio bar, the Respondent undertook the following oath of office:

I Do Solemnly Swear:

I will support the Constitution of the United States and the Constitution of the State of Ohio;

I will maintain the respect due to courts of justice and judicial officers;

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, or any defense except such as I believe to be honestly debatable under the law of the land;

I will employ for the purpose of maintaining the causes confided to me such means only as are con-

sistent with truth and honor and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my client and will accept no compensation in connection with his business except from him or with his knowledge and approval;

I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed or delay any man's cause for lucre or malice, So Help Me God.

The foregoing Stipulations Of Fact are hereby entered into on this 13th day of September, 1982.

/s/ C. W. Kettlewell
C. W. Kettlewell
Office of Disciplinary Counsel

360 South Third St.,
Suite 109
Columbus, Ohio 43215
(614) 461-0256
Counsel for Relator

/s/ David K. Frank
David K. Frank
SCHWENKER, CLOUD & TUDOR

8 East Broad Street

Columbus, Ohio 43215
(614) 228-8787
Counsel for Respondent

BEFORE THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

In Re:	:	
Complaint against	:	
Philip Q. Zauderer,	:	
52 West Whittier		
Columbus, Ohio 43206	:	
Respondent	:	Case No. 454
Office of Disciplinary Counsel,		
360 S. Third Street, Suite 109	:	
Columbus, Ohio 43215	:	
Relator.		

AMENDMENT TO STIPULATION OF FACT BETWEEN RELATOR AND RESPONDENT

The Stipulation of Fact entered into by the parties on September 13, 1982, is hereby amended as follows:

1. In Paragraph 29 of the said Stipulation of Fact, two additional newspapers should be included in the list of papers in which the Dalkon Shield advertisement appeared, *The Columbus Citizen-Journal*, March 11, 1982, and *The Columbus Dispatch*, March 10. 1982.

2. In Paragraph 32 of the said Stipulation of Fact, the following number, representing the approximate total combined circulation of the newspapers in which the Dalkon Sheld advertisement appeared, should be inserted: 1,180,160.

The foregoing Amendment is hereby executed on this 17th day of November, 1982.

/s/ C. W. Kettlewell
C. W. Kettlewell
OFFICE OF DISCIPLINARY COUNSEL
360 South Third Street
Suite 109
Telephone: (614) 461-0256
Counsel for Relator

/s/ David K. Frank
David K. Frank
SCHWENKER, CLOUD & TUDOR
8 East Broad Street
Columbus, Ohio 43215
Telephone: (614) 228-8787
Counsel for Respondent

BEFORE THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

In Re:	:	
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Philip Q. Zauderer,	:	
52 West Whittier		
Columbus, Ohio 43206	:	
Respondent	:	Case No. 454
Office of Disciplinary Counsel,		
360 S. Third Streeet, Suite 109	:	AMENDED COMPLAINT
Columbus, Ohio 43215		
Relator.		

Now comes the Relator and alleges that Philip Q. Zauderer, an Attorney-at-Law, duly admitted to the practice of law in this State of Ohio is guilty of the following misconduct:

COUNT I

1. Relator, Office of Disciplinary Counsel, is authorized to file this Complaint pursuant to Gov. Rule V.
2. Philip Q. Zauderer, Respondent, was admitted to the practice of law in the State of Ohio on October 17, 1964, and is subject to the Rules for the Government of the Bar of Ohio.

COUNT II

3. On November 25, 1981, and November 26, 1981, Respondent caused to be published the Columbus Citizen Journal an advertisement offering legal services by him, wherein he offered "a full legal refund if convicted" of "drunk driving". (Exhibit A).
4. Relator alleges that this legal service advertisement constitutes an offer of a "contingent fee" for services rendered in a criminal matter, which offer violates Disciplinary Rule 2-101(B)(15).

COUNT III

5. Relator incorporates herein all allegations contained in prior paragraphs and alleges as follows:

6. Relator says that contingency fees in criminal cases are specifically prohibited by Disciplinary Rule 2-106(C) of the Ohio Code of Professional Responsibility.
7. Relator alleges that advertising himself as being available to perform a legal service under conditions which are not permitted under the Code of Professional Responsibility constitutes a violation of Disciplinary Rule 2-101(A) in that such representation is false, fraudulent, misleading, and deceptive to the public.

COUNT IV

8. Relator incorporates herein all allegations contained in prior paragraphs and alleges as follows:
9. Disciplinary Rule 2-101(B) sets forth the list of information which can be published in a legal service advertisement.
10. On or about March 11, 1982, Respondent caused to be published in the Columbus Citizen-Journal an advertisement which contained substantial information which is not permitted by Disciplinary Rule 2-101(B), including reference to a specific, potential legal problem, which language is not necessary to advise the public of information which is needed to enable a consumer to properly identify or evaluate, a legal need (Exhibit B).
11. During March, April and May of 1982, Respondent caused the same legal service advertisement or an advertisement essentially identical in nature, to be run in several daily newspapers throughout the State of Ohio.
12. Relator alleges that the content of said ad constitutes a violation of Disciplinary Rule 2-101(A) and (B).

COUNT V

13. Relator incorporates herein all allegations contained in prior paragraphs and alleges as follows:
14. Disciplinary Rule 2-101(B) prohibits the use of "drawings, illustrations, animations, portrayals, dramatizations, slogans, music, lyrics, or other use of pictures, except the use of pictures of the advertising lawyer, or the use of a portrayal of the scale of justice" in a legal services advertisement.

15. The advertisement referenced in the preceding Count IV includes a drawing or other illustration of an "I.U.D."
16. Relator alleges that the publication of said drawing or illustration in a legal service advertisement constitutes a violation of Disciplinary Rule 2-101(B).

COUNT VI

17. Relator incorporates herein all allegations contained in prior paragraphs and alleges as follows:
18. Disciplinary Rule 2-101(B) provides that legal service advertisements must be "presented in a dignified manner."
19. Relator alleges that the inclusion of a drawing or illustration or other representation of an I.U.D. in a legal service advertisement and the inclusion of comments which are directed at exciting action rather than informing the public does not constitute a "dignified manner" for informing a consumer of the availability of a practitioner to perform certain legal services, and that such material is detrimental to the public and serves no legitimate purpose which should or need be approved for legal service advertising and that such conduct constitutes a violation of Disciplinary Rules 2-101(A) and (B) and 1-102(A)(6).

COUNT VII

20. Relator incorporates herein all allegations contained in prior paragraphs and alleges as follows:
21. Relator asserts that prior to November, 1981, Respondent caused a certain advertisement to be published in newspapers, as a result of which Relator had discussions with Respondent pertaining to the existence of relevant rules of the Code of Professional Responsibility as adopted by the Supreme Court of Ohio and as then were in effect and which pertained to the legal service advertisement which Respondent was then running.
22. Relator states that as a result of its correspondence and meetings with Respondent in regard to the prior advertisement, Respondent was completely informed of all prohibitions contained in Disciplinary Rule 2-101 and

other relevant sections of the Code of Professional Responsibility.
23. Relator alleges that Respondent thereafter had full knowledge of the relevant sections of the Code of Professional Responsibility and that the placement of the two advertisements now in question was done with the intent to violate Disciplinary Rule 2-101, all of which constitutes a violation of Gov. Rule V and the Oath of Office.

COUNT VIII

24. Relator incorporates herein all allegations contained in prior paragraphs and alleges as follows:
25. Disciplinary Rule 2-101(B) specifies the manner in which advertisements regarding contingent fee rates may be made:

(15) Contingent fee rates subject of DR-2106(C), provided that the statement discloses whether percentages are computed before or after deduction of court costs and expenses.

26. Respondent's advertisement (Exhibit B) offered representation on a contingent basis. There is no statement about the method for computing such fee as required by DR 2-101(B)(15).
27. Relator asserts that the failure to include the qualification regarding computation of contingent fee is a violation of DR 2-101(B)(15) and a violation of DR 2-101(A) as a deceptive statement likely to mislead the public.

COUNT IX

28. Relator incorporates herein all allegations contained in prior paragraphs and alleges as follows:
29. In publishing Exhibit B, Respondent provided unsolicited advice that the reader should obtain legal counsel or take legal action if she had used the Dalkon Shield I.U.D., and if she had also had certain types of medical problems.
30. The advertisement further identified Respondent as a lawyer and stated that "our law firm is presently representing women on such cases."

31. Subsequent to the publication of the unsolicited advice (Exhibit B), Respondent accepted employment as attorney for Beverly J. Carr, who sought Respondent's representation after reading the advertisement.
32. Subsequent to the publication of the unsolicited advice (Exhibit B), Respondent accepted employment as attorney for Kaye M. Carver and Jerry E. Carver who consulted Respondent after reading the advertisement. Because of that advertisement, a suit was filed on the Carvers' behalf by Respondent, *Carver v. A.H. Robins Co., et al.*, Case No. C-2-82-537, Southern District of Ohio.
33. Disciplinary Rule 2-103(A) prohibits an attorney from recommending employment of himself to one who has not sought his advice regarding the employment of a lawyer.
34. Disciplinary Rule 2-104(A) prohibits an attorney from accepting employment after giving unsolicited advice to an individual that he obtain counsel or take legal action.
35. Relator alleges that Respondent's recommendation of himself for subsequent employment and the acceptance of employment in these circumstances constitute violations of DR 2-103(A) and DR 2-104(A).

/s/ Charles W. Kettlewell
Charles W. Kettlewell
Assistant Disciplinary Counsel
OFFICE OF DISCIPLINARY COUNSEL

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Telephone: (614) 461-0256
Counsel for Relator

/s/ Kathryn Haller
Kathryn Haller
Staff Counsel

OFFICE OF DISCIPLINARY COUNSEL
360 S. Third St., Suite 109
Columbus, Ohio 43215
Telephone: (614) 461-0256
Counsel for Relator

[Certificate, Rule V, Exhibits A & B, and Certificate of Service omitted in printing]

BEFORE THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

Re:	:	
Complaint Against	:	
Philip Q. Zauderer,	:	
Respondent,	:	Case No. 454
	:	
Office of Disciplinary Counsel	:	
Relator.	:	

ANSWER OF RESPONDENT PHILIP Q. ZAUDERER

The Respondent, by his counsel, in answer to the Relator's Amended Complaint:

1. Admits that Gov. Rule V purports to authorize the Relator to file the complaint.

2. Admits that the Respondent was admitted to the practice of law in Ohio on October 17, 1964 and admits that he is subject to the Rules for Government of the Bar of Ohio only to the extent that such rules are pursuant to and do not abridge or are in conformity with the provisions of the Ohio Constitution and the Constitution of the United States of America.

3. Admits that he caused to be published on November 25, 1981, the advertisement attached as "Exhibit A" to Relator's Amended Complaint.

4. Denies the allegations of paragraph four of Relator's Amended Complaint.

5. Restates, in response to paragraph five of the Relator's Amended Complaint, his responses to paragraphs one through four of the Amended Complaint, as set forth in this Answer.

6. Admits that Disciplinary Rule 2-106(C) prohibits a lawyer in Ohio from "entering into an arrangement for," or "charging" or "collecting" a "contingent fee for representing a defendant in a criminal case."

7. Denies that the Respondent advertised himself "as being available to perform legal service under conditions which are

not permitted," and specifically denies that the advertisement in qustion (attached as "Exhibit A" to the Relator's Amended Complaint) was "false, fraudulent, misleadng and deceptive to the public."

8. Restates, in response to paragraph eight of the Relator's Amended Complaint, his responses to paragraphs one through seven of the Amended Complaint, as set forth in this Answer.

9. Admits, in response to paragraph nine of the Relator's Amended Complaint, that Disciplinary Rule 2-101(B) purports to regulate the content of advertisements published or broadcast by lawyers in Ohio.

10. Admits, in response to paragraph ten of Relator's Complaint, that on or about March 11, 1982, the Respondent caused to be published in the *Columbus Citizen-Journal* the advertisement, a copy of which is attached to the Relator's Amended Complaint as "Exhibit B."

11. Admits the allegations contained in paragraph 11 of Relator's Amended Complaint.

12. Admits that the content of the said advertisement ("Exhibit B") may, in part, technically violate the blanket prohibition of Disciplinary Rule 2-101(B) against the use of any information not specifically authorized by that Rule.

13. Restates, in response to paragraph 13 of the Relator's Amended Complaint, his responses to paragraphs 1 through 12 of the Amended Complaint, as set forth in this Answer.

14. Admits the allegations of paragraph 14 of Relator's Amended Complaint.

15. Admits the allegations of paragraph 15 of the Relator's Amended Complaint, and specifically states that the drawing or illustration is that of a Dalkon Shield, an I.U.D. manufactured and distributed by the A.H. Robins Company.

16. Admits, in response to paragraph 16 of the Relator's amended complaint, that the publication of the drawing or illustration may technically violate the blanket prohibition of Disciplinary Rule 2-101(B) against the use of such drawings or illustrations.

17. Restates, in response to paragraph 17 of the Relator's Complaint, his responses to paragraphs 1 through 16 of the Amended Complaint, as set forth in this answer.

18. Admits the allegations of paragraph 18 of the Relator's Amended Complaint.

19. Denies the allegations of paragraph 19 of the Relator's Amended Complaint, and specifically denies that the advertisement in question is directed at "exciting action" rather than "informing the public."

20. Restates, in response to paragraph 20 of the Relator's Amended Complaint, his responses to paragraphs 1 through 19 of the Amended Complaint as set forth in this Answer.

21. Admits the allegations of paragraph 21 of the Relator's Amended Complaint.

22. Admits the allegations of paragraph 22 of the Relator's Amended Complaint with the exception of the allegation that he was informed of all "other relevant sections of the Code of Professional Responsibility."

23. Admits, in response to paragraph 23 of the Relator's Complaint, that the Respondent was familiar with Disciplinary Rule 2-101 relating to advertising, but states that the (Dalkon Shield) advertisement (a copy of which is attached to the Relator's Amended Complaint as Exhibit B) was published only after the United States Supreme Court issued its landmark decision concerning lawyer advertising on January 25, 1982 in *R.M.J.*, 102 S. Ct. 929 (1982), which was also published in the *Ohio State Bar Association Report,* Vol. 55, No. 8, February 22, 1982, at pages 309-319, and after a conference on March 5, 1982 with Judge Stern of the Relator who indicated that there was an apparent conflict between Ohio's version of DR 2-101 and the permissible scope of regulation under *R.M.J.*, and that his office (Relator) would follow the law of the land on the subject of advertising (as set forth by the United States Supreme Court).

24. Restates, in response to paragraph 24 of the Relator's Amended Complaint, his responses to paragraphs 1 through 23 of the Amended Complaint as set forth in this answer.

25. Admits, in response to paragraph 25 of the Relator's Amended Complaint, that Disciplinary Rule 2-101(B), in its purported regulation of the "content" of advertisements published or broadcast by lawyers in Ohio, provides in subsection (15) that the following information may be published or broadcast:

> Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of court costs and expenses.

26. Denies, in response to paragraph 26 of the Relator's Amended Complaint, that the advertisement (Exhibit B) "offered representation on a contingent fee basis," or that any "statement about the method for computing" a contingent fee was required by DR 2-101(B) to be included in the advertisement.

27. Denies the allegations of paragraph 26 of the Relator's Amended Complaint.

28. Restates, in response to paragraph 28 of the Relator's Amended Complaint, his responses to paragraphs one through 27 of the Relator's Amended Complaint, as set forth in this Answer.

29. Denies the allegations of paragraph 29 of the Relator's Amended Complaint.

30. Admits, in response to paragraph 30 of the Relator's Amended Complaint, that the advertisement (Exhibit B) stated, in part, that "our law firm is presently representing women on such cases."

31. Admits, in response to paragraph 31 of the Relator's Amended Complaint that he "accepted employment as attorney for Beverly J. Carr who sought Respondent's representation after reading the advertisement," but specifically denied that the publication of the advertisement (Exhibit B) constituted "unsolicited advice."

32. Admits, in response to paragraph 32 of the Relator's Amended Complaint, that he "accepted employment as attorney for Kaye M. Carver and Jerry E. Carver who consulted

Respondent after reading the advertisement, and that he filed *Carver v. A. H. Robins Co., et al.*, Case No. C-2-82-537, Southern District of Ohio, on behalf of the Carvers.

33. Admits the allegations of paragraph 33 of the Relator's Amended Complaint, but only to the extent that the "prohibition" imposed by DR 2-103(A) is pursuant to or in conformity with and does not abridge any provision of the Ohio Constitution and the Constitution of the United States of America, or applicable law.

34. Admits, except as otherwise provided in DR 2-104(A)(1) through (5), the allegations of paragraph 34 of the Relator's Amended Complaint, but only to the extent that the "prohibition" imposed by DR 2-104(A) is pursuant to or in conformity with and does not abridge any provisions of the Ohio Constitution and the Constitution of the United States of America, or applicable law.

35. Denies, in response to paragraph 35 of the Relator's Amended Complaint, that he recommended himself for subsequent employment, or that his representation of Beverly J. Carr or the Carvers constitutes a violation of either DR 2-103(A) or DR 2-104(A).

36. Respondent denies each and every allegation contained in the Relator's Amended Complaint and not specifically admitted.

FIRST DEFENSE

[Violation of Respondent's Federal Constitutional Rights]

37. Disciplinary Rule 2-101 (B) is unconstitutional on its face and as applied in this case, for it impermissibly restricts, impedes, infringes upon and violates the Respondent's rights which are guaranteed by the First, Ninth and Fourteenth Amendments to the Constitution of the United States of America.

SECOND DEFENSE

[Violation of Respondent's State Constitutional Rights]

38. Disciplinary Rule 2-101 (B) is unconstitutional on its face and as applied in this case, and impermissibly restricts, infringes upon and violates the Respondent's rights which are

guaranteed by Article I, Section 11, Article I, Section 20, and Article I, Section 1 of the Ohio Constitution.

THIRD DEFENSE

[Violation of the Public's Federal Constitutional Rights]

39. Disciplinary Rule 2-101(B) is unconstitutional on its face and as applied in this case, for it impermissibly restricts, impedes, infringes upon and violates the public's rights under the First, Ninth and Fourteenth Amendments to the Constitution of the United States of America including, but not limited to: (1) the right of persons to receive information; (2) the right of access and redress in the courts; (3) the right to litigate; and (4) the right of freedom of association.

FOURTH DEFENSE

[Violation of the Public's State Constitutional Rights]

40. Disciplinary Rule 2-101(B) is unconstitutional on its face and as applied in this case, for it impermissibly restricts, impedes, infringes upon and violates the public's rights guaranteed by the Ohio Constitution including, but not limited to: (1) the right of "seeking and obtaining happiness and safety (guaranteed by Article I, Section 1); (2) the right to receive information (guaranteed by Article I Section ll); (3) the right of freedom of association and the right "to consult for their common good" (guaranteed by Article I, Section 3); and (4) the right to litigate and the right of access to the courts (guaranteed by Article I, Section 16 and Article I, Section 20).

FIFTH DEFENSE

[Vagueness]

41. With respect to Count VI of the Relator's Amended Complaint, the term "dignified manner" contained in the language of DR 2-101(B) which states, in part, that information disclosed must be "presented in a dignified manner" is unconstitutionally vague, and contrary to the Fourteenth Amendment to the Constitution of the United States of America and Article I, Section 1 of the Ohio Constitution.

SIXTH DEFENSE

[Canon 2]

42. The Respondent's actions were in full compliance with and pursuant to Canon 2 of the Code of Professional Responsibility which provides that "a lawyer should assist the legal profession in fulfilling its duty to make legal counsel available," and EC 2-1 which provides that:

> The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their legal problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

SEVENTH DEFENSE

[Estoppel]

43. With respect to Counts IV through VII of the Relator's Complaint, the Relator is estopped from prosecuting and seeking the discipline of the Respondent on such counts or asserting such counts since the Respondent caused the Dalkon Shield advertisement (Exhibit B to Relator's complaint) to be published only after the United States Supreme Court issued its January 25, 1982 decision in *R.M.J.*, 102 S. Ct. 929 (1982), and a meeting was had with the Relator who advised the Respondent that it would follow the "law of the land" on lawyer advertising as set forth by United States Supreme Court, notwithstanding the fact that Ohio's Disciplinary Rule 2-101(B) apparently conflicts with the scope of regulation deemed permissible by the Supreme Court in *R.M.J.*

44. Respondent relief [sic] on this opinion in causing the advertisement in question to be published and would not have published the advertisement had he not been so informed by Relator, and had he not believed the advertisement was entirely proper under the language of *R.M.J.* and the law of the land.

EIGHTH DEFENSE

[Acknowledgment of No Violation of DR 2-101(A)]

45. Counts VI and VIII of the Relator's Amended Complaint, in part, allege a violation of Dr 2-101 (A) which provides that:

> A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

46. In paragraph 30 of the "Stipulation of Fact Between Relator and Respondent", filed September 30 [sic], 1982, the Respondent admitted and acknowledged that:

> "The Dalkon Shield advertisement published by the Respondent does *not* contain a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim."

NINTH DEFENSE

47. Rule V, Section (4) of the Supreme Court Rules for The Government Of the Ohio Bar provides that:

> The investigation of complaints shall be concluded within sixty days from the receipt of the complaint. *A decision as to the disposition of such complaint shall be made within thirty days thereafter.*
>
> [Emphasis Added]

48. Despite the fact no complaint with respect to the advertisement which is the subject of Counts II and III of the Relator's Complaint, was received after December 4, 1981, a decision as to the disposition of such complaint(s) was *not* made within 30 days, and the Relator's complaint was not filed until more than *eight months later.*

49. The Relator is bound by Rule V and may not now maintain its prosecution based on Counts II and III.

50. In the Relator's Amended Complaint, Counts VIII and IX were tacked on to those contained in the original complaint. The new counts were not made in accordance with

Rule V, Section (4), and the Relator may not maintain its prosecution based on these Counts.

TENTH DEFENSE

51. Count IX of Relator's Amended Complaint alleges, in effect, that the Respondent engaged in unproper "solicitation" by causing the Dalkon Shield advertisement (Exhibit B) to be published.

52. DR 2-103(A) does not, and was not intended to properly apply to newspaper advertisements, such as the Dalkon Shield advertisement, where the potential "evils" traditionally associated with in-person solicitation, such as overreaching or undue influence, are not present.

ELEVENTH DEFENSE

[Violation of Respondent's Constitutional Rights]

53. Even assuming, *arguendo,* that Respondent's publication of the Dalkon Shield advertisement (Exhibit B) constituted a "recommendation" of his employment "to a non-lawyer who has not sought his advice regarding employment of a lawyer" (which the Respondent specifically denies), Disciplinary Rule 2-103 (A) is unconstitutional on its face and as applied, for it permissibly restricts, impedes, infringes upon and violates the Respondent's rights which are guaranteed by the First and Fourteenth Amendments to the Constitution of the United States of America, and by Article I, Section 11, Article I, Section 20, and Article I, Section 1 of the Ohio Constitution.

TWELVTH DEFENSE

[Violation of the Public's Constitutional Rights]

54. Disciplinary Rule 2-103(A) is unconstitutional on its face and as applied in this case, for it impermissibly restricts, impedes, infringes upon and violates the public's rights under the First and Fourteenth Amendments to the Constitution of the United States of America including, but not limited to: (1) the right of persons to receive information; (2) the right of access and redress in the courts; (3) the right to litigate; and (4) the right of freedom of association; and it impermissibly restricts, impedes, infringes upon and violates the public's

rights guaranteed by the Ohio Constitution including, but not limited to: (1) the right of "seeking and obtaining happiness and safety" (guaranteed by Article I, Section 1); (2) the right to receive information (guaranteed by Article I, Section 11); (3) the right of freedom of association and the right "to consult for their common good" (guaranteed by Article I, Section 3); and (4) the right to litigate and the right of access to the courts (guaranteed by Article I, Section 16 and Article I, Section 20).

THIRTEENTH DEFENSE

[Violation of the Respondent's Federal Constitutional Rights]

54.* Even assuming, *arguendo,* that by publishing the Dalkon Shield advertisement (Exhibit B) the Respondent thereby gave "unsolicited *advice* to a layman that he should obtain counsel or take legal action", (which the Respondent specifically denies), Disciplinary Rule 2-104 on its face, and as applied, is unconstitutional, for it impermissibly restricts, impedes, infringes upon and violates the Respondent's rights guaranteed by the First, Ninth and Fourteenth Amendments of the Constitution of the United States of America, including, but not limited to: (1) the right to liberty; (2) the right of freedom of association; (3) the right of freedom of speech and press.

FOURTEENTH DEFENSE

[Violation of the Respondent's State Constitutional Rights]

55. Even assuming, *arguendo,* that by publishing the Dalkon Shield advertisement (Exhibit B), the Respondent thereby gave "unsolicited advice to a layman that he should obtain counsel or take legal action", (which the Respondent specifically denies), Disciplinary Rule 2-104 on its face and as applied, is unconstitutional, for it impermissibly restricts, impedes, infringes upon and violates the Respondent's rights guaranteed by Article I, Section 1, Article I, Section 2, and Article I, Sction 20 of the Ohio Constitution.

* Two paragraphs bear No. 54 in original answer.

FIFTEENTH DEFENSE

[Violation of the Public's Federal Constitutional Rights]

56. Disciplinary Rule 2-104 is unconstitutional on its face and as applied in this case, for it impermissibly restricts, impedes, infringes upon and violates the public's rights under the First, Ninth and Fourteenth Amendments to the Constitution of the United States of America including, but not limited to: (1) the right of access and redress in the courts; (2) the right to litigate; and (3) the right of freedom of association.

SIXTEENTH DEFENSE

[Violation of the Public's State Constitutional Rights]

57. Disciplinary Rule 2-104 is unconstitutional on its face and as applied in this case, for it impermissibly restricts, impedes, infringes upon and violates the public's rights guaranteed by the Ohio Constitution including, but not limited to: (1) the right of "seeking and obtaining happiness and safety" (guaranteed by Article I, Section 1); (2) the right of freedom of association and the right "to consult for their common good" (guaranteed by Article I, Section 3); and (3) the right to litigate and the right of access to the courts (guaranteed by Aticle I, Section 16 and Article I, Section 20).

SEVENTEENTH DEFENSE

[Failure to State a Violation - DR 2-101(B)]

58. In view of the fact that Disciplinary Rule 2-101(B) is unconstitutional on its face and as applied, Counts II, and IV through VIII fail to state a claim or violation upon which "relief" can be granted to the Relator.

EIGHTEENTH DEFENSE

[Failure to State a Violation - DR 2-103, DR 2-104]

59. In view of the fact that Disciplinary Rules 2-103 and 2-104, as applied to the facts of this case, are unconstitutional, Count VIII fails to state a claim or violation upon which "relief" can be granted to the Relator.

NINETEENTH DEFENSE

[Oath of Office]

60. As an Ohio lawyer, the Respondent took a sworn Oath of office, required by the Supreme Court of Ohio, stating in pertinent part:

I will support the Constitution of the United States and the Constitution of the State of Ohio.

* * * * * * * * *

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed or delay any man's cause for lucre or malice, So Help Me God.

61. The Respondent's action in publishing the Dalkon Shield advertisement was in accordance with the Respondent's duty under his oath of office.

62. To the extent there is a conflict between the disciplinary rules in question [which have not been modified since the United States Supreme Court's ruling in *Matter of R.M.J.*, 102 S.Ct. 929 (1982)], and the Respondent's affirmative obligations imposed by the oath of office, the obligations of the oath of office govern.

63. Any prosecution or discipline of the Respondent for his action in fulfilling the sworn duty imposed upon him by the oath of office is improper and inappropriate.

TWENTIETH DEFENSE

[Article IV, Ohio Constitution]

64. Article IV, of the Ohio Constitution does not authorize the Supreme Court of Ohio to issue or adopt Rules prescribing or limiting the actual content of advertisements by lawyers.

TWENTY-FIRST DEFENSE

[Invalidity of Disciplinary Process]

65. Ohio's disciplinary process under Rule V of the Rules For The Government Of The Bar violates the Respondent's right of due process, guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States of America, and by Article I, Sections 1, 16 and 20 of the Ohio Constitution.

66. Under this process the Supreme Court promulgates rules, acts to prosecute and enforce the rules (through its agents and employees of the Office of Disciplinary Counsel of the Supreme Court of Ohio), and sits as to the fact finder and interprets and applies the rules, even when its rules are attacked as being unconstitutional.

TWENTY-SECOND DEFENSE

67. Ohio's disciplinary process under Rule V violates the guarantee of a "Republican form of government" secured by Article IV, Section 4 of the Constitution of the United States of America, and the fundamental principle of separation of powers.

WHEREFORE, Respondent prays that the Relator's complaint be dismissed.

Respectfully submitted,
/s/ David K. Frank

DAVID K. FRANK
(FRA-04)
SCHWENKER, CLOUD & TUDOR
8 East Broad Street
Columbus, Ohio 43215
(614) 228-8787

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing answer was served by first class U.S. mail, postage prepaid, upon Charles W. Kettlewell, and Kathryn Haller, 360 South Third Street, Suite 109, Columbus, Ohio 43215, counsel for Relator, on this 14th day of January, 1982.

David K. Frank
ATTORNEY AT LAW

BEFORE THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

In re:	:	
Complaint Against:	:	
Philip Q. Zauderer,	:	Case No. 454
Respondent,		
	:	
Disciplinary Counsel,	:	
Relator.	:	

SECOND STIPULATION OF FACT BETWEEN RELATOR AND RESPONDENT

In supplementation to the Stipulation of Fact filed herein on September 13, 1982, the Relator and Respondent and their counsel, without the necessity for evidence, hereby stipulate and agree that the following facts are true and can and should be treated as such:

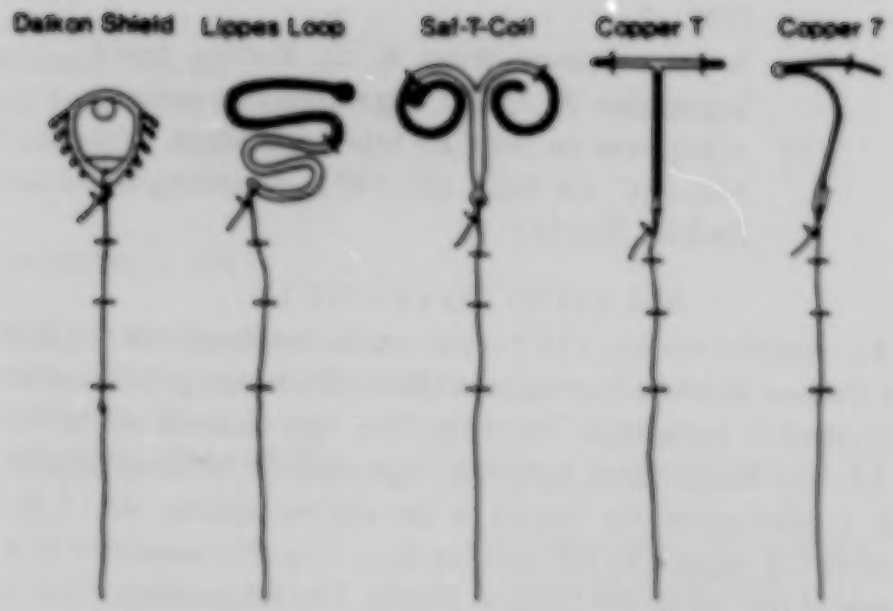
RELATING TO COUNTS IV, V, VI, IX

Dalkon Shield Advertisement

35. The graphic illustration contained in the advertisement attached to the Relator's Amended Complaint as Exhibit B is an illustration of the Dalkon Shield, an intrauterine contraceptive device (IUD) manufactured and marketed by the A. H. Robins Co.

36. During the time period that the Dalkon Shield was being marketed in the United States (June 13, 1970 through June 28, 1974), and since June 28, 1974, other brands or types of intrauterine contraceptive devices (IUD's) were being or have been sold or marketed in the United States.

37. The following diagram taken from an article entitled "The Dalkon Shield Controversy, Structural and Bacteriological Studies of IUD Tails," *JAMA*, February 17, 1975, Vol. 231, No. 7, at page 713 (and attached to the Brief in Support of Respondent's Motion to Dismiss filed herein) illustrates the principal types of IUD's marketed in the United States.



38. Relator knows of no client of the Respondent who has made a complaint about the publication of this Dalkon Shield advertisement.

39. The investigation regarding the Dalkon Shield advertisement was initiated after communications from other members of the Ohio Bar and the Ohio Osteopathic Association about the advertisement.

40. After the Respondent published the Dalkon Shield advertisement, Columbus counsel for A. H. Robins Co. telephoned the Relator regarding that advertisement.

41. In addition to technical, medical and scientific journals and reports, at least the following information has been made available regarding the Dalkon Shield:

(a) Press releases and newspaper articles in 1974 regarding the decision to remove the Dalkon Shield IUD from the market (Exhibit 3-1 and 3-2).

(b) A notice in 1980 to obstetricians and gynecologists nationwide from A. H. Robins

recommending actions to be taken on behalf of patients who still used the Dalkon Shield IUD.

(c) A press release from A. H. Robins dated September 25, 1980, regarding this notice.

(d) A segment on the CBS television show, "60 Minutes" on April 19, 1981, regarding the Dalkon Shield IUD.

RELATING TO COUNT IX

42. Approximately 235 people contacted Respondent after the Dalkon Shield advertisement (Exhibit B) was published as described in paragraph 29 of the first Stipulations of Fact.

43. The Respondent agreed to represent 95 of these people (on a contingent fee basis) in an action against the A.H. Robins Co. regarding the injuries they allegedly sustained as a result of the use of the Dalkon Shield. The Respondent filed a federal lawsuit on behalf of each such person he agreed to represent.

44. Respondent has also agreed to represent (on a contingent fee basis) 11 people who contacted him following publication of the Dalkon Shield advertisement regarding injuries they allegedly sustained as to the result of the use of another type of IUD.

APPROVED:

/s/ David K. Frank
David K. Frank
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Counsel for Respondent

/s/ Kathryn Haller
Kathryn Haller, Assistant
DisciplinaryCounsel

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Counsel for Relator

[Press Releases, Exhibits 3-1 and 3-2, omitted in printing.]

EXHIBIT C

Philip Q. Zauderer
Attorney at Law
Whittier Square
52 West Whittier Street
Columbus, Ohio 43206
614 445-8416

December 1, 1981

Richard W. Kettlewell, Esq.
Office of Disciplinary Counsel
360 South Third Street
Columbus, Ohio 43215

Re: Newspaper Advertising
Drunken Driving

Dear Mr. Kettlewell:

I am writing this letter in response to our telephone conversation of December 1, 1981, in which you requested a letter from me setting forth my position in regard to the captioned advertisement.

The wording of this ad was illconceived, in that it is without question in violation of the Rule prohibiting contingency fees in criminal cases. There was no intent on my part to disregard this Rule, I just simply forgot the existence of such a Rule inasmuch as the last time I read it I was in law school, and that has been some twenty years ago.

Since becoming aware of the fact that this ad is contrary to the Canons of Professional Ethics, I immediately withdrew it and no criminal cases were accepted by me on a contingency fee basis, nor have any such cases been accepted on this basis in the past. The two persons who responded to this ad were advised that their cases could not be handled as set out in my advertisement and they were referred to other counsel.

I have now thoroughly familiarized myself with all the Rules and Canons of Professional Ethics applying to advertising and solicitation of clients in criminal cases with regard to fees, and I can assure you that there is no danger of my making any such mistakes in the future.

Respectfully yours,
/s/ Philip Q. Zauderer
Philip Q. Zauderer

PQZ/jn

EDITOR'S NOTE

PAGES 45 thru 51 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

A careless roadrunner
named Fred
Slipped under a light that was red.
He thought he'd go free
With a "No Contest" plea,
But now he's a jailbird instead.

"No Contest" is only an admission of facts charged against you. But even in traffic court, "No Contest" can land you in jail as fast as "Guilty."
Yet, in certain instances, pleading "No Contest" is the smartest thing you can do. So how do you plead?
Call your lawyer. Sound legal advice can cost a lot less than you think. And it can keep you out of trouble.

ohio state bar association

What you don't know about the law could cost you.

Respondent's Exhibit 4

A carefree old spirit named Bill
Passed on without writing a will.
His kin battled on
'Til his fortune was gone,
Leaving nothing but
dust in the till.

Not having a will could leave your loved ones up to their necks in costly legal hassles. Even if you're single or young, the effects could be devastating.

And more than your possessions are at stake. Because probate court may have different ideas than you do about who will raise your children. Or who will get your property.

If you don't have a will, call your lawyer.* Writing a will can be a simple matter and in most cases costs very little. But most importantly, it protects the ones you love.

ohio state bar association

What you don't know about the law could cost you.

*If you don't know a lawyer, call the Lawyer Referral Service in Ohio: 1-800-282-0600

Respondent's Exhibit 6

Benita found bats in her attic,
And gave her ol' landlord
some static.
"Forget it!" he yelled,
So her rent she withheld.
Her eviction was quite automatic.

Holding back your rent is not the way to get your landlord to make necessary repairs. One thing you can do, however, is deposit your rent with the Clerk of your Municipal or County Court.

The court will hold your rent until your differences are resolved. This will also protect you from eviction if you are acting in good faith.

There is no filing fee, and you don't need a lawyer. But your lawyer* can be a big help. Besides, sound legal advice can cost a lot less than you think. And it can keep you out of trouble.

ohio state bar association

What you don't know about the law could cost you.

*If you don't know a lawyer, call the Lawyer Referral Service in the Cincinnati area call 381-8200 Elsewhere in Ohio: 1-800-282-0600

Respondent's Exhibit 5

Hank's housekeeper slipped accidentally -And was hospitalized consequently. When the hospital bill Came to Hank he got ill. Did he need Worker's Comp? Evidently.

Ohio law requires that you have Worker's Compensation coverage if you pay more than $160 total wages in any calendar quarter.

That includes your babysitter, the kid who cuts your grass, the college student who paints your house. What's more, your homeowner's insurance may not protect you.

Should you be covered? If you're not sure, call your lawyer.* Sound legal advice can cost a lot less than you think. And it can keep you out of trouble.

ohio state bar association

What you don't know about the law could cost you.

*If you don't know a lawyer, call the Lawyer Referral Service. In the Cincinnati area call 381-8359. Elsewhere in Ohio: 1-800-282-6500.

Respondent's Exhibit 8

Jill signed for a sea-cruise one day, When they promised her wind, salt and spray. But a line of fine print Read, "You'll love your new stint As our figurehead pointing the way."

New laws are doing more these days to protect you as a consumer. But you still can get yourself in over your head by not reading and understanding what you sign.

For example, the new Home Solicitation Law gives you three business days to cancel any contract you sign as a result of door-to-door or telephone solicitation. But unless you understand the terms of the contract the law does you little good.

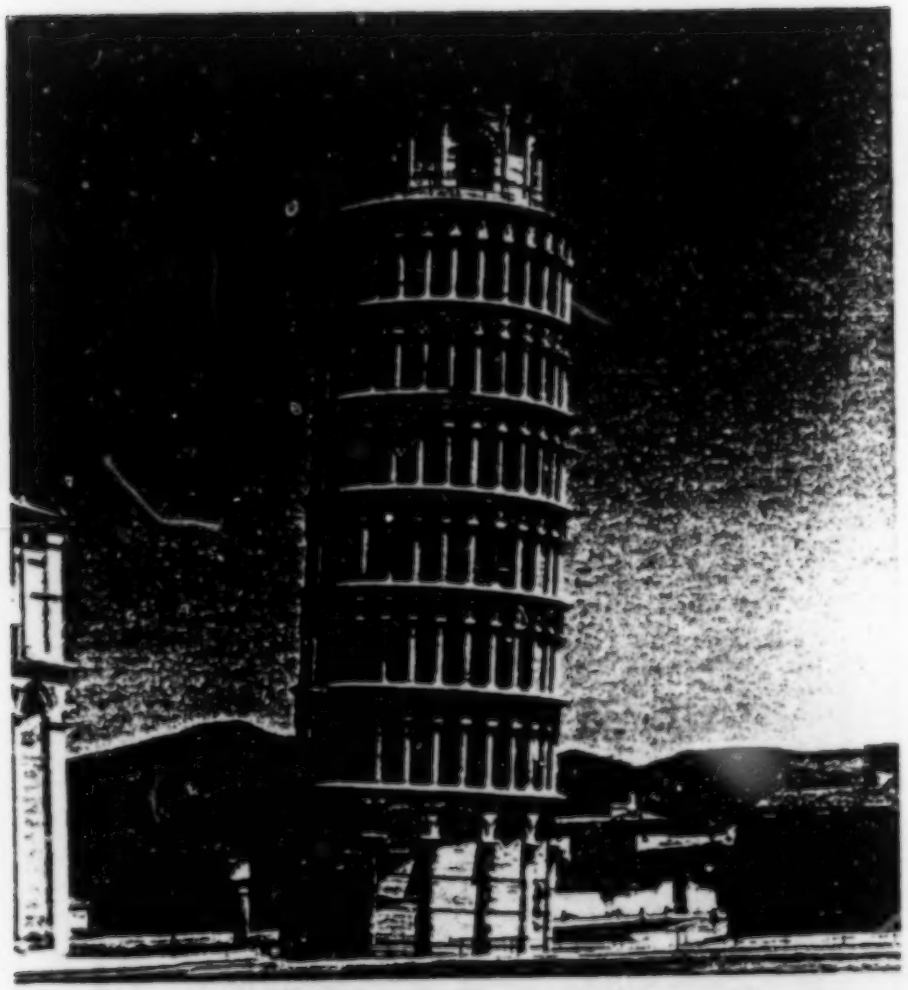
If you don't understand a contract, don't sign. Call your lawyer.* Sound legal advice can cost a lot less than you think. And it can keep you out of trouble.

ohio state bar association

What you don't know about the law could cost you.

*If you don't know a lawyer, call the Lawyer Referral Service. In the Cincinnati area call 381-8359. Elsewhere in Ohio: 1-800-282-6500.

Respondent's Exhibit 7



Bet the purchase agreement never mentioned the condition of the house.

A house may seem ideal in appearance and price. But if you sign a contract with no protection written for you, your dream may fall on its face.

So how do you prevent such a thing from happening to you? It's simple. See a lawyer *before* you sign an offer to purchase. He can make sure that the papers fully protect you against wasting your hard-earned money. His services cost far less to keep you out of hot water than to get you out once you're in.

So, before you sign your life or your life's savings away, bring the contract to a lawyer. It probably will cost less than you think.

ohio state bar association

See your lawyer. If you don't know a lawyer, call the Lawyer Referral Service in Ohio: Call Toll Free 1-800-282-6500.

Respondent's Exhibit 9

If you don't have a will, guess who could wind up with the kids.

Uncle Harry.

In fact, if you don't have a will and something happens to both you and your spouse, Uncle Harry could wind up raising the kids and controlling your entire estate. Because, without a will, you don't have any say after the hereafter.

Since drafting a will is much too delicate a task to handle alone, you should first see your lawyer. He's the only person professionally qualified to help you avoid the numerous pitfalls and to offer sound advice on your particular situation. His service costs less than you might think, and it's a small price to pay for the future of your family.

ohio state bar association

See your lawyer. If you don't know a lawyer, call the Lawyer Referral Service in Ohio: 1-800-282-6500.

Respondent's Exhibit 10